SUPREME COURT, U.S.
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No. 93-1589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SEARS ROEBUCK AND COMPANY
and STATE INDUSTRIES, INC.,
Petitioners,

v.

ANNIE HARRIS, as administratrix
of the estate of JOYCE SIMPSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondents have misconstrued the question presented, enabling them to focus almost entirely on a non-issue. They purport to discern from the petition for certiorari "two quite distinct constitutional claims," one "complaining that the jury awarded five separate and different amounts of punitive damages to the five plaintiffs" and the other addressed to "the Alabama Supreme Court's affirmance of a total punitive damage award of $6.5 million." Opp. at 4-5. But the single, fundamentally important question presented here is not whether these particular punitive damage awards—either separately or in the aggregate—exceed substantive limits on punitive damage awards. Rather, petitioners challenge the Alabama post-verdict *procedures* for inflicting punitive damages as applied in this case and in the multitude of other cases since this Court approved the Alabama punitive damage system in *Pacific Mutual Life Insurance Co.* v. *Haslip,* 499 U.S. 1 (1991).

In *Haslip,* this Court perceived Alabama's punitive damage system as including constitutionally sufficient protections against arbitrary and fundamentally unfair punishments, emphasizing its belief that the Alabama post-verdict review procedures constitute a "meaningful and adequate" restraint on the standardless discretion of juries to assess unlimited punishment.[1] However, as this case illustrates, "[p]ost-

[1] "The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they

Haslip reviews by the [Supreme Court of Alabama] . . . indicate that the procedures, when applied, are not adequate and meaningful." *Intercontinental Life Ins. Co.* v. *Lindblom*, 598 So. 2d 886, 892 n.4 (Ala.) (Maddox, J., dissenting), *cert. denied*, 113 S. Ct. 200 (1992).

Although this Court in *Haslip* was under the impression that the Alabama Supreme Court had developed "detailed substantive standards . . . for evaluating punitive awards," 499 U.S. at 21, it has now become brutally apparent that the reality is quite different. Even members of Alabama's highest court have come to acknowledge that their system is utterly standardless. As Justice Houston explained with respect to the $4,000,000 punitive damage award for the wrongful death claim in this case, there is

> no standard by which to determine whether a wrongful death award is excessive or inadequate. It is not excessive or inadequate if five members of this Court hold that it is not excessive or inadequate; it is excessive or inadequate if five members of this Court hold that it is excessive or inadequate.

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share key characteristics of criminal sanctions." *Landgraf* v. *USI Film Products*, No. 92-757, slip op. at 37 (U.S. Apr. 26, 1994). However, "[u]nlike criminal penalties, . . . punitive damages are not awarded within discernible limits." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting). The lack of any legislatively established "range of penalties as to which responsible officials had deliberated and then agreed" requires that the courts "look longer and harder" at punitive damage awards than other types of monetary punishments, which "fall within statutory limits." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

Pet. App. 101a (Houston, J., concurring and dissenting).

Respondents maintain that petitioners "have presented *no* evidence that the Alabama system for reviewing punitive damage awards is malfunctioning" or that there is a "problem with the *review* system." Opp. at 9 (emphasis in original). But the evidence is everywhere. While acknowledging that "a majority of appeals lead to affirmances," respondents hail four decisions in which remittitur was ordered as proof that the Alabama Supreme Court engages in meaningful review of punitive damages. Opp. at 10. Yet, these cases contain the very evidence that respondents cannot see. There is no consistent standard of review that can be discerned from those cases other than the fact that the Alabama Supreme Court occasionally decides arbitrarily to reduce a punitive damage award by precisely 50%. Pet. at 16 n.13.

Illustrative of the Alabama Supreme Court's approach is *Northwest Mut. Life Ins. Co.* v. *Sheridan*, 630 So. 2d 384 (Ala. 1993), in which the court stated that it had "independently reviewed the evidence presented in this case," block-quoted the *Haslip* factors and then reduced the punitive damage award with mathematical precision from $25,727,248 to $12,863,624, exactly in half, without explaining how any of the *Haslip* factors could yield that result. *Id.* at 394-95. While the outcome in *Sheridan* and the other cases mentioned by respondents certainly constituted a reduced outrage, that hardly demonstrates that the *procedure* used by the Alabama Supreme Court to review punitive damage awards is applied in a constitutionally rational manner. Nor does it even come close to demonstrating that the resulting pun-

ishments in such cases bear any intelligible relationship to the alleged wrongful conduct that occurred or the harm caused. And, of course, these cases address only a small fraction of the massive punitive damage verdicts that have been returned by Alabama juries in the three years since *Haslip*.

Respondents do acknowledge the "long list of substantial jury *verdicts*" awarding punitive damages in Alabama since *Haslip*,[2] but assert that "most" of these cases "were not appealed, have appeals pending, or were reduced in post-trial settlements." Opp. at 9 (emphasis in original). Thus, according to respondents, these cases "hardly show[ ] a problem with the *review* system." *Id.* (emphasis in original). Respondents' dismissal of those cases, however, misses the point, which is that the avalanche of multimillion dollar punitive damage verdicts in Alabama demonstrates the urgency of the crisis in Alabama and underscores the importance of this Court ad-

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[2] The punitive damage binge continues at a breathtaking pace in the Alabama courts. In the four and one-half weeks since the petition was filed, Alabama juries have racked up $40 million in punitive damages. *See Clark* v. *Performance Toyota, Inc.*, No. CV-92-2437-BLK (Mobile County, Ala. Cir. Ct. Apr. 20, 1994) ($10 million in punitive damages in wrongful death action); *Whittington* v. *Waste Management of Ala.*, No. CV-93-77-RTC (Mobile County, Ala. Cir. Ct. Apr. 8, 1994) ($5 million punitive damage verdict in environmental case where $86,000 in compensatory damages were awarded; post-trial motion pending); *Gallant* v. *Prudential Ins. Co.*, No. CV-93-50 (Barbour County, Ala. Cir. Ct. Apr. 6, 1994) (two punitive damage verdicts against insurance company -- one for $7.5 million and one for $17.5 million—for alleged misrepresentations by insurance agent where plaintiffs allegedly suffered, at most, $600 in out-of-pocket loss; post-trial motions pending).

dressing the constitutional infirmities of the Alabama system.

Respondents urge that the Court keep sealed the door slammed shut by *Haslip* because it "has already affirmed the constitutionality of the Alabama *system*," making this case both "fact-specific" and "unremarkable." Opp. at 9, 11 (emphasis in original). But since *Haslip*, state and federal courts across the Nation have considered the Alabama system to be some kind of benchmark against which to measure the constitutionality of punitive damage schemes, *see* Pet. at 21-22, so a review of the system approved in *Haslip* would be extremely useful and provide urgently needed guidance. Although *Haslip* emphasized the need for a meaningful judicial "check . . . on the jury's discretion," 499 U.S. at 20-21, it did not articulate what standard of post-verdict review the Due Process Clause requires. Various Members of the Court expressed concern about this issue at the time *Haslip* was decided, *id.* at 39 (Scalia, J., concurring in judgment); *id.* at 64 (O'Connor, J., dissenting), and, more recently, throughout the oral argument in *Honda Motor Corp.* v. *Oberg*, 93-644, *cert. granted*, 114 S. Ct. 571 (1994) (argued Apr. 20, 1994).[3] This case is a timely and appropriate vehicle for resolving this important question.

There are ample objective indicia that the post-verdict review of the punitive damage awards in this case was constitutionally inadequate. As Justice Houston recognized, there is no justifiable basis for permitting five widely varying punitive damage awards to stand when each was intended to punish the same

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[3] *See* Transcript in No. 93-644, at 3-9, 11, 15-16, 18-21.

act. *See* Pet. App. 101a. Respondents defend the substantial disparity of the respective punitive awards on the ground that this disparity was intended "to reflect the extent of the injury incurred by each plaintiff." Opp. at 8. But that cannot be the case because the court below affirmed all of the punitive damage judgments even as it substantially reduced each of the compensatory awards, including the $750,000 jury award to Mrs. McCord—which the court reduced to $1.[4]

Finally, although respondents argue that petitioners waived any challenge to the size or arbitrariness of the punitive damage awards by failing to object to

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[4] Respondents also suggest that the duplicative punishment problem is insignificant because petitioners "cite not a single case dealing with awards to multiple plaintiffs." Opp. at 7. However, there are numerous examples of courts permitting multiple punitive damage awards to be imposed in the same case to punish the same act or course of conduct. *See, e.g., Robertson Oil Co.* v. *Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993) (*en banc*), *pet. for cert. pending* (U.S. No. 93-1533); *Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085, 1086 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992); *General Chemical Corp.* v. *De La Lastra*, 852 S.W.2d 916 (Tex.), *cert. dismissed*, 114 S. Ct. 490 (1993); *Gallant* v. *Prudential Ins. Co.*, No. CV-93-50 (Barbour Country Ala. Cir. Ct. April 6, 1994) (jury verdict imposing $7.5 million in punitive damages against insurance company on vicarious liability theory and $17.5 million against company for failure adequately to supervise insurance agent whose actions were imputed to the company on vicarous liability theory). A jury in New York recently awarded three plaintiffs $18 million each in punitive damages in an asbestos liability case, *Heltzer* v. *Owens-Corning Fiberglass Corp.*, Nos. 4393/89, 113070/93, 113071/93 (N.Y. Sup. Ct.), reportedly because "the number 18 symbolizes life in Hebrew." Lambert, *Jurors Calculate Punitive Damages in Unusual Manner*, Wall St. J., p. B10, col. 1, Apr. 14, 1994.

the statutorily required verdict form, *see* Opp. at 4-7,[5] respondents cannot and do not dispute that petitioners' due process challenge to the Alabama Supreme Court's application of its post-verdict review procedures was properly presented below. At their first opportunity—on rehearing—petitioners expressly argued that the court below "did not perform the . . . review" constitutionally required by this Court's decision in *Haslip*, Pet. App. 43a, and that is all that was required under this Court's practice. *See, e.g., Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 86 n.9 (1979); *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930); Pet. at 9.

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[5] Respondents' waiver argument is without merit. *See* Pet. at 7-10. Petitioners explicitly and repeatedly raised their Due Process Clause claims prior to trial, after the verdict, on appeal and rehearing. Indeed, the trial court expressly rejected petitioners' due process arguments on the merits, Pet. App. 62a, and the decision below purporting to invoke a state procedural rule was an obvious and discriminatory attempt to shield this case from federal constitutional scrutiny. Pet. at 9-10. Moreover, petitioners did not, by any stretch of the imagination, "invite" (Opp. at 5) the imposition of five arbitrary, irrational and radically varying punishments for the same act in the same case that bear no relationship whatsoever to the conduct at issue or any harm resulting from that conduct.

Indeed, the verdict form has nothing to do with petitioners' due process attack on the Alabama Supreme Court's application of its post-verdict review procedures and its resulting determination to allow the punishments to stand, even as it materially reduced the compensatory damage awards and found that one respondent, Mrs. McCord, who was awarded $250,000 in punitive damages, suffered *no* injury at all.

CONCLUSION

For the foregoing reasons and those set forth in the petition, this Court should grant certiorari and set this case for plenary consideration.

May 11, 1994

Respectfully submitted,

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